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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RONALDO P. RODRIGUES,

Petitioner,

vs.

MARTIN MARIETTA CORPORATION
MASTER BUILDERS DIVISION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

Where respondent-employer's written corporate policy provides in its employee manual for ERISA foreign service benefits to all employees hired in the United States and transferred to work in its foreign subsidiaries:

Does

(A) 42 USCS § 2000e-1 exempt the employer from the operation of 42 USCS § 2000e-2 and free it to discriminate with respect to its U.S.A. permanent resident alien employee, hired and trained in the U.S.A. and transferred to work in its foreign subsidiaries outside the U.S.A. under its direction and control, on the basis of the employee's national origin and place of birth by concealing and withholding these benefits from him?

(1) So as to preclude any liability for these benefits under 29 USCS § 1140 for the acts of the American employer in furtherance of the concealment and withholding that

constituted and interferred with the employee's attainment of the ERISA benefits?

(2) So as to preclude any liability for these benefits under 42 USCS § 1981?

(3) So as to preclude any liability for these benefits under Ohio State contract law, the doctrine of non pari delicto and state contract rights protected under the Fourteenth Amendment of the United States Constitution?

(4) So as to preclude the invoking of the doctrine of equitable tolling by a duly diligent permanent resident U. S. alien employee while he was outside the U.S.A. working for the foreign subsidiary on behalf of the American company?

PARTIES

The Petitioner to this action is:

Ronaldo P. Rodrigues

The Respondents to this action are:

Martin Marietta Corporation
Master Builders Division

Martin Marietta Pension Plan for Salaried Employees of the Master Builders Division of Martin Marietta Corporation

TYSON, Marge I., Administrator of the Martin Marietta Pension Plan for Salaried Employees of the Master Builders Division of Martin Marietta Corporation

BEGGS, Tom, Administrator of the Martin Marietta Pension Plan for Salaried Employees of the Master Builders Division of Martin Marietta Corporation

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PETITION FOR A WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The opinions of the District Court for the Northern District of Ohio, Eastern Division, and the U.S. Court of Appeals for the Sixth Circuit, appear in the appendix hereto.

JURISDICTION

The final judgment of the District Court for the Northern District of Ohio, Eastern Division, was entered on March 31, 1986. A Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit was filed by Petitioner on April 30, 1986, appealing the March 31, 1986 final judgment and the District Court's denial of Petitioner's Motion to Vacate and for Reconsideration of April 29, 1986.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on September 16, 1986.

The Petitioner, requests the review of the opinion of the Court of Appeals for the Sixth Circuit, affirming the

summary judgment in favor of the Respondents of the District Court.

This petition for writ of certiorari is filed within ninety (90) days of the final judgment of the U.S. Court of Appeals for the Sixth Circuit. This court's jurisdiction is invoked pursuant to 28 USCS § 1254(1).

The basis for jurisdiction in the Federal District Court in the first instance arises under 28 USCS § 1331, 28 USCS § 1332, 29 USCS § 1132 and 28 USCS § 1343 (3)(4), 42 USCS § 1981 and the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Federal statutes 42 USCS § 2000e-1, 42 USCS § 2000e-2, 42 USCS § 2000e-7, 42 USCS § 1981, 29 USCS § 1140, and ERISA 29 USCS § 1001, et seq.
Ohio Revised Code 4112.02.

STATEMENT OF THE CASE

The International Division of Master Builders of Ohio, conducted its international operations from its principal place of business in Cleveland Heights, Ohio at the time it hired the Petitioner, Ronaldo P. Rodrigues in October of 1975 and thereafter. Master Builders of Ohio was a Division of the Martin Marietta Corporation which owned and operated foreign subsidiary companies in many foreign countries.

Rodrigues, at the time of his hire, had the status in the United States of America as a resident green card alien. It was contemplated between the parties, the International Division and Rodrigues, that Rodrigues's duties would involve in part working in foreign countries

under the direction and control of the International Division.

Rodrigues was a citizen of Brazil and negotiated with the International Division for an assignment in Brazil where Rodrigues still had family.

After the International hired Rodrigues in Cleveland Heights, Ohio he worked for nine (9) months at the International's Cleveland Heights facility. In June of 1976 Rodrigues was transferred to Brazil by the International Division to work for the foreign subsidiary companies of the Martin Marietta Corporation located there and in Argentina under its direction and control. He worked in Brazil for a period of seven (7) years, and in February of 1984 was terminated with

the International Division declining to fly Rodrigues back to Cleveland, Ohio contrary to their usual policy.

Rodrigues has contended throughout that the International Division's decision not to fly him back to the United States from Brazil at the end of his tenure of employment was one of the last discriminatory acts of the International Division acted out in Cleveland Heights, Ohio, U.S.A., discriminating against Rodrigues with respect to his compensation, terms, conditions or privileges of employment because of his Brazilian origin, contravening 42 USCS § 2000e-2 (a)(1).

In the summer of 1984 Rodrigues returned at his own expense to Cleveland, Ohio to seek new employment with an

American company and discovered for the first time that the International Division had a written corporate policy that provided foreign service fringe benefits to all employees of the International who were hired in the United States and transferred by the International to work in the foreign subsidiaries of the Martin Marietta Corporation. Further, that this policy applied equally to U.S. citizens as well as aliens hired in the United States.

Rodrigues filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) within One Hundred Eighty (180) days from the failure of the International to fly Rodrigues back to Cleveland, Ohio. A Notification of Right to Sue was re-

ceived from the EEOC on September 19, 1984 and an action was brought thereunder by the filing of this Complaint on October 30, 1984 within ninety (90) days of receipt of the Notification of Right to Sue in the Federal District Court.

Shortly after Rodrigues learned of the International Division's written corporate policy with regard to the foreign service fringe benefits in the summer of 1984, he discovered that the foreign service benefits included payment by the International Division of pension benefits, social security taxes, as well as an education and housing allowances. Consequently, upon retaining an attorney he wrote to the Administrator of the Pension Plan pursuant to 29 USCS § 1024 and § 1132, on August 13,

1984 to determine his pension status inasmuch as Rodrigues had been a participant and a beneficiary under the pension plan when he worked for the International Division in 1975 and 1976 in Cleveland Heights, Ohio prior to transfer to Brazil.

It was acknowledged by an administrative official of the pension plan that Rodrigues had indeed received credit toward his pension in 1975 and 1976. However, Rodrigues received no other credits toward his pension after he was transferred to Brazil.

Rodrigues was duly diligent in pursuing his ERISA claim after his July of 1984 discovery for the first time that ERISA foreign service fringe benefits had attached to his job

description and standing with the International Division of Master Builders at the time of his hire in October of 1975 in Cleveland Heights, Ohio.

The statute of limitations for bringing an action pursuant to 29 USCS § 1140 in Ohio is six (6) years. See Cowden v. Montgomery Co. Soc. for Cancer Control, 591 F. Supp. 740, page 755, that applies Ohio Revised Code § 2305.07. The statute begins to run after the denial by the Administrator of the pension plan denying Rodrigues his status as a participant or beneficiary after his transfer to Brazil in June of 1976. This denial came after Rodrigues had already filed suit on October 30, 1984 in Federal District Court. See Miles v. N.Y. State Teamsters Conference Pension

& Retirement Fund Employee Pension Ben. Plan, 698 F.2d 593 (CA2 1983).

Rodrigues contends that the International Division interferred with his attainment of his right to participate in the ERISA foreign service benefits when it changed his status on the International Division's records from a U.S.A. resident green card alien transferring to a foreign subsidiary to an alien returning to his home country, without his knowledge, consent and without informing him that it was done for the express purpose of denying him foreign service benefits. It is contended that the International Division interferred again when it left Rodrigues stranded in Brazil, refusing to fly him to Cleveland, Ohio as was

the company policy so as to continue the concealment from Rodrigues and prevent him from discovering the existence of the ERISA foreign service fringe benefits and their applicability to him.

The International Division had actually interferred with Rodrigues's right to participate in the ERISA foreign service fringe benefits when it made a pre-hire investigation into Rodrigues's national origin prohibited by Ohio Revised Code § 4112.02 (E)(1) and (2) for the express purpose of denying him these ERISA foreign service fringe benefits, evidenced by a letter written in Cleveland, Ohio by an International Division officer to its foreign subsidiary in Brazil. Thus, the

International Division acted out from the inception of its contact with Rodrigues through a continuous series of acts through his termination in Brazil, its discriminatory animus designed to conceal the existence of these foreign service fringe benefits which every other International Division employee, alien and citizen alike received, for the express purpose of unlawfully depriving him from the attainment of his right to participate in these ERISA benefits.

All others were told of these ERISA benefits privately at time of transfer. No other had his alien status secretly changed by the company on its books at the time of transfer. Rodrigues was the only person so treated by the company.

See the Affidavit of Paul Guttman, a former officer of the International Division in the Appendix.

Rodrigues functioned as a Manager for the foreign subsidiary. Congressional intent with regard to § 1140 makes it clear that Rodrigues was the very person to be protected by this statute. See West v. Butler, 621 F.2d 240.

Rodrigues contends that the foreign service benefits were vested as a term, condition and privilege of employment under 42 USCS § 2000e-2.

As stated in Hishon v. King & Spaulding, 467 U.S. 69 at page 74:

> "The contractual relationahip of employment triggers the provision of Title VII governing 'terms, conditions, or privileges of employment.' Title

VII in turn forbids discrimination on the basis of 'race, color, religion, sex, or natural origin.'"

In Arizona Governing Committee v. Norris, 463 US 1073, 1090:

"Since employers are ultimately responsible for the 'compensation, terms, conditions, [and] privileges of employment' provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination."

As stated Hishon at page 75, supra.,

"...An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a 'privileg[e] of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled

> out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all."

Hishon at 467 US, page 69 supra., stands for the proposition that:

> "...The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment...a benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship..."

Because Rodrigues's employer, the International Division totally concealed from Rodrigues the existence of ERISA foreign service fringe benefits throughout his tenure of employment and Rodrigues had no knowledge whatsoever with regard to the deception being worked upon him until his discovery of the existence of ERISA

foreign service policy benefits in July of 1984, and thus under the doctrine of equitable tolling his EEOC complaint and District Court complaint, filed August 13, 1984 and October 30, 1984, respectively, based upon a EEOC right to sue letter issued September 19, 1954 are timely filed to bring Rodrigues under 42 USCS, § 2000e-2, since it is clear that both the national origin discrimination and the interference with the attainment to the right to participate in the ERISA foreign service fringe benefits has been continuous since June of 1975 to the present time.

It's an ineluctable doctrine of contract law, "that certain respective rights and duties are defined by law and imposed upon the parties without any

question of their knowledge of or assent to these specific terms." See Williston on Contracts, Third Edition, Volume I, Section 32A, Page 90.

Rodrigues contends that the International Division is contractually liable under 42 USCS § 2000e-2 and that that once liability is established with respect to a U.S.A. resident green card alien, it cannot be divested by the operation of 42 USCS § 2000e-1 when that alien is transferred from his U.S.A. place of hire and training,to work at the direction and control of the American company in its foreign subsidiaries.

Rodrigues contends that contract liability attaches as a matter of contract law to the ERISA foreign service fringe benefits under Ohio law in that

these benefits were part of the written policy of the International Division and kept in its employee manual. Though admittedly Rodrigues never saw this manual, it being concealed from him, he claims his contractual attach to these ERISA foreign service fringe benefits in that he has a right to rely that his EEOC employer will apply equally to him the terms, privileges and conditions contained in that employee manual as it has to all other employees similarly situated. When the employer holds itself out as an Equal Opportunity Employer the employer should have reasonably expected its representation implicit therein of even-handedness to be relied upon by its employee for which the doctrine of promissory estoppel is avail-

able to enforce his contract rights. See Biskupich v. Westbay Manor Nursing Home (1986), 33 Ohio App. 3d 220, Syl. 2, & 3.

Rodrigues further contends that his contract rights attach under the doctrine of non pari delicto to the ERISA foreign service benefits in that Rodrigues did not nor could not in the aforesaid factual context and circumstances under both Federal and State law have agreed legally with his employer, based on his Brazilian ancestry, Brazilian nationality, Brazilian citizenship and his status as a U.S.A. permanent resident alien to forego the ERISA foreign service fringe benefits since they were a part of his compensation, terms, conditions or privileges of employment mandated under 42 USCS

§ 2000e-2.

For example, Rodrigues could not agree with his employer when he was hired in the U.S.A. to permit his employer to forego the payment of his Social Security taxes that his employer paid with respect to all others similarly situated who were transferred to foreign subsidiaries, especially where the respondent employer had entered into a contractual agreement with the Internal Revenue Service to make such payments. See Guttman Affidavit in Appendix.

This becomes more apparent when it is recognized that Rodrigues became a permanent resident alien in Cuyahoga County, Ohio, U.S.A. since 1964, and during that time he married, had children, graduated college, registered for

the draft in the U.S.A., worked for U.S.A. employers, paid his dues to the American Labor Union he belonged to, paid local, state and federal taxes, and paid into the U.S. Social Security system for a number of years, all of which occurred while working in Cuyahoga County, Ohio.

The ERISA foreign service fringe benefits included the payment of Rodrigues's Social Security taxes by the company and they were additionally tied to his pension benefits. Rodrigues only worked Eight and One-Third (8-1/3) years for the International Division though he was paid directly by the foreign service subsidiary while in Brazil. He therefore contends that he is a participant and a beneficiary under ERISA even though his pension plan did not vest until Ten (10)

years of service, and that under these circumstances his employer should be required to pay the unpaid Social Security taxes and credit Rodrigues with Eight and One-Third (8-1/3) years of service since he may again work for the respondent employer and tack those years of service towards his pension.

Rodrigues further contends that the International Division engaged in one continuous tortious concealment, based on national origin discrimination starting from his pre-hire interview with his employer, and that his termination was wrongful by the decision in Cleveland Heights, Ohio in 1984 of the International Division not to fly him back as all others had been. Therefore, it is contended that by virtue of the litigation

continuing for an additional three (3) years after termination that those years may be tacted on to Rodrigues's Eight and One-Third (8-1/3) years to qualify him as to the Ten (10) year vesting requirement of the pension plan, should it be found that he was wrongfully discharged. The concealment by the respondent employer of the ERISA foreign service fringe benefits should permit the invoking of the doctrine of equitable tolling with regard to all of Rodrigues's claims so that the statute of limitations or the doctrine of laches should not start to run until July of 1984 when he discovered their existence.

Rodrigues is nevertheless timely with regard to his breach of contract claims since it is clear that the Inter-

national Division in Cleveland Heights, Ohio at all times had contractual duties with Rodrigues with regard to these ERISA foreign service fringe benefits and the statute did not start to run until the breach occurred with Rodrigues's termination in Brazil in February of 1984.

Rodrigues alternately contends that if he has no contract rights with regard to the foreign service fringe benefits, that he has a right of action and that the respondent employer is contractually liable under 42 USCS § 1981, and under further authority of Saint Francis College v. Al-Khazraji, 481 US--,95 L.Ed. 2d 582.

This claim is based on the International Division's categorizing

Rodrigues as a Hispanic and refusing to permit him to make and to enforce the same contract for ERISA foreign service fringe benefits to which he was entitled by the application of the full and equal benefit of all the laws relating thereto that is and was enjoyed by white citizens of the U.S.A. working for the International Division because of Rodrigues's Brazilian birth and Brazilian national origin. See Affidavit Appendix pg. A112.

The International Division's intentional discrimination was further manifested at the time of his termination in Brazil when it caused to be withheld from Rodrigues funds its foreign subsidiaries had accumulated and set aside under Brazilian law in a special fund that was to be used for

the express purpose to pay Rodrigues unemployment compensation that he became entitled to as a consequence of his termination. The witholding of these funds required the services of an attorney and delayed his departure from Brazil to the U.S.A. all of which was part of the continuous tort. Thereafter Rodrigues signed a release that released the foreign subsidiary in Brazil only and received his unemployment compensation.

The Federal District Court below granted summary judgment in favor of the Respondents and ordered each party to bear its own costs. The U.S. Court of Appeals for the Sixth Circuit affirmed in an unpublished opinion.

REASONS FOR GRANTING THE WRIT

The instant case presents legal issues of national importance with substantial financial consequences to American companies with foreign subsidiaries who employ both resident and non-resident aliens interchangeably between the American company and its foreign subsidiary.

These issues hinge on the legal application of the extra-territorial effect and interpretation of 42 USCS § 2000e-1 with regard to permanent resident aliens of the U.S.A. hired and trained by their American employer in the U.S.A. and then transferred to work on behalf of the American corporation under its direction and control in its

foreign subsidiary outside the country. The workplace has become more complex with the Federal Antidiscrimination Laws, ERISA, and the employee corporate manuals being superimposed on contracts at will by operation of law to the end that employees are vested with rights and employers with liabilities that have become the subject of legal dispute.

The issues in this case have only been inferentially addressed by the United States Supreme Court. 42 USCS § 2000e-1 has never been specifically addressed by this Court. There is great doubt as to how and when it is to be applied, and its meaning. See Bourselan v. Aramco, 653 F. Supp. 629. This case examines and discusses the murky legal

status of 42 USCS § 2000e-1. It then contributes to the confusion by deciding that American citizens working outside the U.S.A. are precluded from the benefits of 42 USCS § 2000e-2 through the application of 42 USCS § 2000e-1. It establishes the exquisite need for this Court's clarification of the statute and the necessity for granting the Writ.

The United States corporations are engaged in a global economy as never before. They conduct their business in foreign countries through the extensive use of foreign subsidiaries. The American companies employ a large number of both permanent U.S. resident aliens and non-resident aliens, to operate their foreign subsidiaries.

Some of the aliens are hired and trained in the U.S.A. and intend to retain, as Rodrigues does, his permanent resident alien status in the U.S.A. and couple it with a career with the company that he is working for. His career contemplated that he would work both in the United States for the company as well as be stationed in foreign countries.

It is important to American companies as well as aliens who work for them, to understand specifically how the anti-discrimination laws and ERISA law of the United States apply in this global economy.

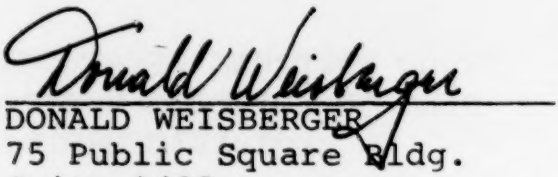
It is therefore respectfully urged and fundamental fairness dictates that this Court declare and define the rights

of the parties to this dispute.

CONCLUSION

The issues raised in this case have had a long gestation period and are now ripe for decision. This Court should therefore grant the Writ of Certiorari.

Respectfully submitted,



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APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT

Filed March 31, 1986

CASE NO. C 84-3387

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALDO P. RODRIGUES,

Plaintiff,

v.

MARTIN MARIETTA CORP., etc. et al.,

Defendants.

ORDER

The court has filed its memorandum and order denying plaintiff's

motion for summary judgment and granting defendants' motion for summary judgment. Therefore,

IT IS ORDERED that the complaint is hereby dismissed, with prejudice, each side to pay their own costs.

s/_____
ANN ALDRICH,
U.S. DISTRICT JUDGE

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT

Filed March 31, 1986

CASE NO. C84-3387

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALDO P. RODRIGUES,

Plaintiff,

v.

MARTIN MARIETTA CORPORATION
MASTER BUILDERS DIVISION, et al.,

Defendants.

MEMORANDUM AND ORDER

This action arises from an employment relationship gone sour. Plaintiff Ronaldo P. Rodrigues, a Brazilian citizen who has permanent

residence status in the United States, was at one time an employee of defendant Martin Marietta Corporation, Master Builders Division ("Martin Marietta" is the corporate parent; "Master Builders" refers to the division that employed Rodrigues in Ohio). Other defendants are the Martin Marietta Pension Plan for Salaried Employees of the Master Builders Division of Martin Marietta Corporation ("Martin Marietta Pension Plan"), and Marge I. Tyson and Tom Beggs, Administrators of the Martin Marietta Pension Plan.[1]

Rodrigues' complaint sets

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[1] Defendants maintain that neither Tyson nor Beggs is or was ever a Martin Marietta Pension Plan administrator. Niznik affidavit para. 8.

forth eight "Counts." His first two counts state claims pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 (1982 and Supp. 1983) ("ERISA"). Count III alleges a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17 (1982) ("Title VII"). Count IV asserts that Master Builders violated rights guaranteed to Rodrigues by 42 U.S.C. §1981 (1982) ("§1981") and 42 U.S.C. §1985(3) (1982) ("§1985(3)"). The remaining counts are state law claims for breach of contract, tortious interference with contractual relations, negligence, and an equitable request for an accounting. Rodrigues seeks many remedies, including, but not limited to, reinstatement as an employee of

Martin Marietta, an injunction against discriminatory treatment of him by the defendants, accountings, money damages, and attorneys' fees.

Pending before the Court are cross motions for summary judgment. For the reasons set forth below, defendants' motion for summary judgment is granted, and Rodrigues' motion for summary judgment is denied.

Jurisdiction is proper pursuant to 28 U.S.C. §1331 (1982) and 28 U.S.C. §1332 (1982).

I.

The relevant facts are not in dispute. Ronaldo Rodrigues was born in Brazil in 1944. In January, 1963, he entered the United States on a student visa to attend high school in Knoxville,

Tennessee. Following his marriage to an American citizen in 1963, he became a permanent resident alien of the United States in April, 1964. He received associate degrees in arts and science from Cuyahoga County Community College in 1974 and a degree from Cleveland State University in 1976.

In 1975, Rodrigues interviewed for a job with Master Builders by speaking to George Tazelaar, its vice president for international sales. Rodrigues' application for employment showed that his permanent residence was Rio de Janeiro and that he sought a position in sales in Brazil. Tazelaar indicated to Carlos Cueva, an officer of a Martin Marietta subsidiary in Brazil that he was considering hiring a

Brazilian to be transferred to Brazil, and Rodrigues was hired by Master Builders following completion of his studies at Cleveland State University. He began training with Master Builders at its Cleveland Heights office in October of 1976, and at that time, he concededly received the same fringe benefits accorded to other Master Builders employees.

In June of 1976, Master Builders officially terminated Rodrigues and stopped paying his pension benefits and social security. Rodrigues was transferred from Ohio to Rioquima S.A., a Brazilian corporation which was a subsidiary of Martin Marietta. Rodrigues occupied a sales manager position in Brazil. His paychecks came from

Rioquima and he was given the benefits required by Brazilian law. He continued, however, to receive correspondence from Master Builders, and occasionally attended its international meetings, and received bonuses and awards from it.

Even through the sale of part of Rioquima and the incorporation of the remainder as Master Builders do Brasil, Rodrigues' employment with the Brazilian entity continued without interruption until 1984. On February 13, he was terminated from Master Builders to Brasil. A subsequent lawsuit in Brazil against the Brazilian company resulted in a settlement in Rodrigues' favor, of approximately $18,000 for release of contract obligations.

Although Master Builders re-

fused to pay for his return to the United States, Rodrigues came back and began an investigation of what benefits he might be entitled to from Master Builders. At that time, he learned that Master Builders maintained a policy which provided "foreign service benefits" for employees who relocated in other countries. He also investigated his entitlement to pension benefits from Master Builders, and he attempted to gain information from the Martin Marietta Pension Plan pursuant to ERISA. Alleging that he was denied benefits and terminated because of discrimination based on his national origin, Rodrigues filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a

right to sue letter dated September 19, 1984, and Rodrigues brought this action on October 30, 1984.

II.

Fed. R. Civ. P. 56(c) governs summary judgment motions and provides:

> ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ....

Important guidance on the nature of materials properly presented in a summary judgment pleading is contained in Fed. R. Civ. P. 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to

> testify to the matters stated therein.... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Haasan v. Cleve-Trust Realty Investors, Inc., 729 F.2d 372 (6th Cir. 1984). "[T]he party

seeking summary judgment must conclusively show that there exists no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Bender v. Southland Corp., 749 F.2d 1205, 1210 (6th Cir. 1984) (citing Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 1979))(emphasis in original). The Sixth Circuit has reiterated repeatedly that "no issue is immune from summary judgment." Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127-28 (6th Cir. 1981), reh'g denied, 668 F.2d 878 (6th Cir.), cert. denied, 450 U.S. 991 (1982); Shavrnoch v. Clark Oil and Refining Corp., 726 F.2d 291, 293 (6th Cir. 1984); Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th

Cir. 1983); Bender v. Southland Corp., 749 F.2d at 1210.

III.

Rodrigues states two claims pursuant to ERISA. First, he argues that he should be awarded a penalty assessed against the administrators of the Martin Marietta Pension Plan, because the information which he demanded pursuant to ERISA was provided to him late and by the wrong person. Second, he desires to recover benefits which have allegedly been wrongly denied to him under the pension plan. The ERISA causes of action will be considered separately.

A. Plaintiff's Request for Information Under ERISA

ERISA provides avenues for employees subject to private pension

plans to obtain information relevant to their plans and their benefits. Section 104(b)(4) of ERISA states:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated....

29 U.S.C. §1024(b)(4) (1982) ("§104(b)(4)"). In addition, §105(a) sets forth the information an employee is entitled to receive about his individual benefits:

> Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available informa-

tion--

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C. §1025(a) (1982) ("§105(a)").

Section 502(c) of ERISA provides a penalty for the dilatory compliance with the above-cited provisions:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the

> amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. §1132(c) (1982) ("§502(c)"). A participant or beneficiary of a pension plan regulated by ERISA has standing to bring an action to enforce §502(c) pursuant to 29 U.S.C. §1132(a)(1)(A) (1982).

Rodrigues alleges that on August 13, 1984 he sent a written request to Tom Beggs, supposedly the administrator of his pension plan, "for the computations and years of service of vested benefits the Plaintiff had under the 'Plan' and for the copy of the 'Plan' and all amendments thereto applicable to the Plaintiff." Complaint, ¶9. Rodrigues received a response to this

letter on October 9, 1984, but he claims that "such letter is not from the person designated by statute to respond." Complaint, ¶11. For these reasons, he demands that the Court impose a fine of $100 per day upon Beggs pursuant to §502(c) for the period beginning thirty days after the letter was received by Beggs.

Defendants do not contest Rodrigues' assertions regarding the manner in which Rodrigues was supplied with the information he requested pursuant to §§104(b)(4) and 105(a). Instead, they argue that Rodrigues is neither a "participant" nor a "beneficiary" of the Martin Marietta Pension Plan, and therefore entitled to no information pursuant to the provisions

he relies upon for his remedy.[2]

Defendants argue that Rodrigues is not a "participant" entitled to a remedy under §502(c) because he is a former employee whose rights in

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2 Both terms are defined by §3 of ERISA:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. §1002 (1982).

the pension plan had not vested before his termination, citing Nugent v. Jesuit High School of New Orleans, 625 F.2d 1285 (5th Cir. 1980). The plaintiff in Nugent had been discharged prior to the vesting of her pension; nevertheless, she argued that she was classified within the statutory definition of "participant" because she was a person who "may become eligible to receive a benefit" from a designated pension plan because she might be rehired by defendant at the conclusion of her age discrimination suit. The Fifth Circuit rejected an interpretation of this language as including former employees as well as current employees whose rights had not yet vested. Despite plaintiff's plausible construction of

the language defining "participant," the court decided that Congress did not intend for administrators of pension plans regulated by ERISA to comply with its "onerous disclosure requirements" for former employees whose benefits had not vested, since that construction would place a significant and costly recordkeeping burden on administrators. Although it indicated it would not permit administrators to deny an accounting where an employee had previously been alerted that her benefits had vested, the court held that even a former employee who did not receive prior notice that her benefits had not vested was not entitled to relief pursuant to §502(c). See also Weiss v. Sheet Metal Workers Local No. 544 Pension Trust, 719 F.2d

302 (11th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 2347, reh'g denied, ___ U.S. ___, 104 S.Ct. 3562 (1984) (plaintiff not a "participant" because he was a former employee who made no credible showing that he was vested and did not claim he would return to work).

Defendants claim that Rodrigues could not have vested benefits under Martin Marietta's Pension Plan for Salaried Employees. First, they deny that Rodrigues was entitled to pension benefits after his transfer to Brazil, because neither Rioquima nor Masters Builders do Brasil is an "Employing Company" under the pension plan. Niznik Affidavit, ¶4. Even assuming, however, that Rodrigues' tenure with the Brazilian companies should be aggregated with

the training he received with Master Builders in Cleveland, the combined length of time he worked with those companies would amount to only 8.33 years. Complaint, ¶16. Article IX of the pension plan states in section (1)(a), that "A Participant shall attain 100% vesting upon completing ten (10) years of service, as hereinafter defined, during his period of employment, as defined in Article III(1)." Section (5) further provides that "a Participant whose employment terminated before he had acquired vesting as provided in this Article IX shall be entitled to no benefits under this Plan...." Rodrigues apparently agrees that these terms of the plan are applicable to him. Complaint, ¶5 ("In accordance with its

Master Builders corporate policy, Plaintiff was entitled to participate in its retirement plan after 10 years of service"). Defendants argue that there is no plausible way for Rodrigues to demonstrate that his pension benefits had vested, allowing him to request the accounting information from the plan administrator pursuant to ERISA.

Rodrigues advances numerous theories to defeat defendants' position that he is not entitled to a remedy under §502(c) because he was not a "participant" as defined by ERISA. First, he contends that he does have vested benefits entitling him to the information which he requested, because his employee retirement plan included social security benefits, which vest

immediately. To support his factual contention regarding the composition of his pension package, Rodrigues relies upon his Personal Benefits Profile 1976 (Plaintiff's Exhibit 3), which indicates that he, or his survivor, will receive both pension plan benefits and social security benefits at his retirement or death.

ERISA does not, however, regulate the management of social security benefits. Section 2 of ERISA establishes that the policy of the Act is to protect "the interests of participants in private pension plans and their beneficiaries...." 29 U.S.C. §1001(c) (1982) (emphasis added). The Supreme Court has found that ERISA was enacted "after careful study of private retire-

ment plans" in order to "ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." Pension Benefit Guaranty Corp. v. R.A. Gray & Co., ___ U.S. ___, ___, 104 S.Ct. 2709, 2713 (1984) (emphasis added). By contrast, Title II of the Social Security Act, 42 U.S.C. §§401-433 (1982) ("Title II") is an insurance plan which is established by statute. Old Age and Survivors Insurance benefits are payable for every individual who meets the statutory requirements. 42 U.S.C. §402 (1982). The distinction between social security benefits and private plans regulated by ERISA is illustrated by the

existence of several provisions which alter ERISA requirements when Title II benefits are available. See 29 U.S.C. §1026(b) (1982); 29 U.S.C. §1054(b)(1)(G) (1982); 29 U.S.C. §1056(b) (1982). In light of the separate origin of social security benefits and private pension plans regulated by ERISA and the comprehensive statutes governing each type of benefit, it is nonsensical to insist that an employee has become a "participant" as defined by §3(7) because he has "vested" social security benefits.

Second, Rodrigues relies upon Gors v. Venoy Palmer Market, Inc., 578 F. Supp. 365 (E.D. Mich. 1984), apparently for the proposition that assurances that his pension benefits had

vested allegedly conveyed to him by his Personal Benefits Profile 1976 permit him to bring suit under §502(c). The Gors court held that representations in a summary pension plan description that plaintiff's benefits would vest in five years, when ten years was required by the actual pension plan, permitted him to bring an action for benefits under the summary plan description. However, the Gors case is totally inapposite to this suit. That court merely decided that it had subject-matter jurisdiction under §502(a)(1)(B) because plaintiff had stated a claim "to recover benefits due to him under the terms of his plan," even though plaintiff relied upon a summary plan description rather than the actual plan. A prerequisite to a

§502(a)(1) suit, however, is that it be brought "by a participant or beneficiary." The Gors court construed only the "terms of the plan" language of §502(a)(1); it did not consider the issue decided in Nugent.

Third, Rodrigues argues that he is free from the Nugent holding because of its express exception:

> We do not, however, hold that an employee who is given a reasonable indication during employment that his or her benefits have vested may thereafter be terminated and denied an accounting because of an ostensible reevaluation of the vesting determination by the plan administrator. Some situations may yet find the absence of prior notice to a former employee of significance for purposes of disclosing individual benefits.

625 F.2d at 1288-1289. Again, Rodrigues apparently relies on his Personal Bene-

fits Profile 1976. This document does indicate that he will be eligible for a fixed amount of retirement benefits pursuant to the pension plan at age 65. However, the first page of the booklet states:

> The benefits shown in this report have been calculated using the assumption that your income will continue at its present level to your normal retirement date and that the Plans and other factors affecting your personal situation will continue unchanged.
>
> * * *
>
> The Pension Plan benefits were computed as of 12/31/75, and were calculated on the assumption that your salary will continue at its current level and that other pertinent factors will remain unchanged....
>
> Every effort has been made to insure that this report is accurate; however,

> your entitlement to any benefit is subject to the applicable provisions and limitations of the Company's benefit plans and policies governing the grant of such benefits.

Furthermore, the bottom of the section of the booklet entitled "What Are Your Benefits Worth?" bears the legend "Subject to applicable plans and policies." Since Rodrigues' pension plan clearly states the conditions for vesting of his benefits, the references in his Personal Benefits Profile 1976 to the terms of the benefit plans and to the necessity of continued employment negate any possible implication that his benefits were already vested.

Fourth, Rodrigues attempts to establish that he has vested rights in his pension benefits by recalculating

his years of service:

> The pension plan provides as to vesting that if an employee works one thousand (1000) hours per year for ten (10) years, he is completely vested. See Defendant's Exhibit G of their motion. (Article IX pg. 42, 43 of the Pension Plan) It is also true that if he worked 2080 hours per year he would receive 10 years' full credit and be vested However, there is no vesting credit given for hours worked in excess of the 2080 per year. The company has elected to define years of service in terms of hours of work performed. See 29 U.S.C. 1052 (b) (1). It cannot lawfully disregard additional hours worked in excess of 2080 hours by anyone for purposes of computing years of vesting under 29 U.S.C. Sec. 1053 (b), especially where it has a schedule for fractional hours worked in regard to vesting.
>
> If an employee in fact worked an additional 1000 hours in excess of 2080 hours in any one year, he is entitled to an additional one year vesting under the Plan. If he worked less, it is in

> accordance with the fractional schedule as found in Article IX (1)(b) of the Pension Plan. The affidavit of Plaintiff (Exhibit 1) reads he worked "substantially in excess of 40 hours per week." Therefore, he should be entitled to additional vesting credit in addition to his 8.133 [sic] years for which he worked for the company.

Plaintiff's Response in Opposition to Defendant Martin Marietta Corporation Master Builders Division, Et Al.'s Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment ("Plaintiff's Brief"), at 22a.

Rodrigues cites no authority for his ingeneous method of calculation, which is contrary to both ERISA provisions and the express terms of the pension plan. The provision establishing minimum vesting requirement defines "year of service" as "a calendar

year, plan year, or other 12-consecutive month period designated by the plan ... during which the participant has completed 1,000 hours of service." 29 U.S.C. §1053(b)(2)(A) (1982). Article IX of the pension plan specifies that "[a] year of service for vesting purposes shall be a vesting computation period during which the Participant has completed at least one thousand (1000) hours," and that "[a] vesting computation period shall be a twelve (12) consecutive months period beginning on the Participant's first day of his period of employment on every anniversary thereof during such period of employment...." Art. IX, §§(1)(b) and (c). Thus, Rodrigues' attempt to create ten years of service in fewer than ten

calendar years cannot be successful.

Rodrigues' additional contentions regarding the availability of a §502(c) remedy to him require less attention. He tries to escape the vesting requirement imposed upon former employees by referring to a possible exception if a plaintiff can show that "there is a significant probability he may return to work and satisfy vesting requirements in the future." Weiss, 719 F.2d at 304. Although Rodrigues prays for reinstatement in this action, potential judicial intervention to satisfy vesting requirements was specifically rejected in Nugent itself. 625 F.2d at 1287. Further, after stating that defendants have "invented the defense that Plaintiff is not a bene-

ficiary," Rodrigues retorts that "[t]he company told him he would benefit by being in the plan, which included being the beneficiary of social security payments which were to be paid and were of a direct and immediate and permanent benefit to Plaintiff regardless of whether or not he was vested under the plan." He later reiterates that defendants mean "to escape liability by claiming that Plaintiff is not a beneficiary." Plaintiff's Brief, at 21. Rodrigues' argument ignores the specific meaning given to the term "beneficiary" by ERISA. He clearly cannot be classified as a person falling within that definition. See supra at 9, n.2.

No plausible reading of the pension plan or ERISA would permit

Rodrigues to be deemed a vested employee for the purposes of the pension plan. Since he is neither a participant nor a beneficiary in Martin Marietta's pension plan, Rodrigues is not entitled to damages pursuant to §502(c).

B. Rodrigues' Other Pension Claims

Rodrigues' second claim does not clearly implicate any cause of action. However, repeated reading of the claim leads this Court to believe that the gist of his complaint is that he has been terminated after 8.33 years of employment to prevent vesting of his pension, based upon animus against his national origin. Rodrigues requests that this Court order defendants to contribute payment in his name to the pension plan for the period between his

transfer to Brazil in 1976 and his termination in 1984; to order that his pension benefits have vested; and to reinstate him.

The Court must agree with defendants that this claim is practically "impossible to comprehend." Defendant Martin Marietta Corporation Master Builders Division, Et Al.'s Memorandum in Support of Motion For Summary Judgment ("Defendants' Brief"), at 14. However, the Court construes Rodrigues' claim as an assertion that depriving him of his pension because of his national origin violates Title VII. Rodrigues argues:

> ERISA was never intended to preempt state law or Title VII. Under R.C. 4112.02 Defendant's inquiry, upon hiring, into Plaintiff's

> national origin and his alienage and Defendant's determination at the outset to deny his fringe, pension and benefits due to this discriminatory act (Exhibit 93) constituted a violation of ERISA and defendant should be accountable therefor. 29 U.S.C. 1140 prohibits discrimination for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Plaintiff's Brief, at 15. He also cites Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), and Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984) in support of this theory.

Shaw and Lane both concern the preemptive effect of §514(a) of ERISA, 29 U.S.C. §1144(a) (1982), on state laws.[3]

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3 Title 29 U.S.C. §1144(a) (1982) provides in relevant part:

Except as provided in subsection (b) of this section, the provisions of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee bene-

Both cases construe the phrase "relate to any employee pension plan." Rodrigues apparently wants this Court to decide that the deprivation of his pension benefits violated an Ohio non-discrimination statute. However, the case at bar is more like Shaw, where a law prohibiting discrimination in structuring benefits was preempted, than like Lane, where state law which prohibited employment discrimination against workers who administer a pension plan was found not to "relate to" the plan itself. Moreover, Ohio Rev. Code Ann. §4112.02 (Page Supp. 1984) was not pleaded in the complaint and cannot be raised in Plaintiff's Brief. In addition, Rodrigues cites no authority or provision of Title VII which would permit him to re-

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3 cont'd
fit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title....

cover pension benefits.

Finally, Rodrigues' reliance on ERISA is misplaced. Section 510 states in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. §301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. §1140 (1982). Clearly, this statute does not prohibit discrimination on the basis of national origin, but discrimination against employees pursuing their pension rights. Cf. Aronson v. Servus Rubber, Division of Chromalloy, 730 F.2d 12 (1st Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 431 (1984)

(considering whether there was discrimination where plan was partially terminated for employees whose plant was being closed). Since Rodrigues had no vested rights under the Martin Marietta pension plan, he cannot state a claim under this section. Accordingly, his second claim is without merit.

IV.

Count III alleges employment discrimination based on national origin as prohibited by §703 of Title VII, which provides in pertinent part:

> It shall be an unlawful practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. §2000e-7(a)(1) (1982). How-

ever, the Court must find that Rodrigues cannot maintain an action under Title VII.

The basis of Master Builders' position that Rodrigues cannot bring a Title VII claim is §702, which states, "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State...." 42 U.S. C. §2000e-1 (1982) ("§702").[4] Only one court has felt compelled to state that §702 means what it clearly says. Love v. Pullman Co., 12 Empl. Prac. Dec. (CCH) ¶11,225 (D.Colo. 1975)(Montreal porters employed in Quebec are not entitled to Title VII relief). Section 702 has been

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4 "State" is defined by §701(i) as including "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act." 42 U.S.C. §2000e(i) (1982).

read to provide negative inferences. See Bryant v. International Schools Services, Inc., 502 F.Supp. 472, 482 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) (Title VII applies to United States citizens employed outside any state); Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 95 (1973) (Title VII applies to the employment of aliens within any state). However, Rodrigues does not cite any case which construes the meaning of §702 other than in its clear terms.

Rodrigues' complaint avers that he is a white male of Brazilian national origin and a resident alien of the United States. Complaint, ¶20. The essence of his Title VII claim is that he was wrongfully discharged and discriminated against by denying him benefits generally granted to Martin Marietta employees transferred abroad. Complaint, ¶24.

Since he is an alien, and his claim arose during his tenure in Brazil, his claim is clearly prohibited by §702. In his brief, Rodrigues seems to assert that his status as a permanent United States resident holding a green card entitles him to Title VII protection. However, the Supreme Court has also rejected the claim that Title VII affords a remedy for employment discrimination based upon alienage -- i.e., a lack of United States citizenship. Espinoza, 414 U.S. 95-96. Thus, Rodrigues is not entitled to the protection afforded under Title VII to aliens employed within the states, or to citizens employed abroad, despite his apparent commitment to this country.

V.

Rodrigues' fourth count alleges that defendants discriminated against him on the basis of his national origin in violation of §1981 and §1985(3). This

alleged discrimination included denial to him of benefits generally afforded to Martin Marietta employees who were transferred out of the United States; his discharge; and the refusal to return him to the United States following his termination.

A.

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Defendants argue that this statute is solely a remedy for racial inequities, not for discrimination on the basis of national origin. The Supreme Court has not yet decided this issue, Delaware

State College v. Ricks, 449 U.S. 250, 256, n. 6 (1980), and the appellate courts which have reached this issue have been divided. Compare Ricci v. Key Bancshares of Main, Inc., 768 F.2d 456, 467. (1st Cir. 1985) ("it is doubtful that §1981 provides any protection against discrimination based solely upon national origin") and Anooya v. Hilton Hotels Corp., 773 F.2d 48, 50 (7th Cir. 1984) (legislative history of §1981 and Supreme Court's characterization of its purpose as the prevention of racial discrimination support conclusion that §1981 does not protect against national origin discrimination) with Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (permitting Mexican-American to seek §1981 protection because that provision "is not necessarily limited to the technical or restrictive meaning of 'race'") and Gonzales v. Stanford Applied

Engineering, 597 F.2d 1298, 1300 (9th Cir. 1979) (permitting claim by Mexican-American under §1981 where allegation of discrimination because of brown skin color). See also Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1253-1254 (6th Cir. 1985), cert. denied, 54 U.S.L.W. 3562 (U.S. Feb. 24, 1986) (court did not decide whether §1981 applies to all national origin claims, but found that §1981 "clearly applies" where Hispanic plaintiff endured slurs of a racial character). However, this Court need not resolve this question, because the clear language of the statute excludes Rodrigues from its scope.

The discrimination Rodrigues was allegedly subjected to occurred during his tenure in Brazil. He was there when he was denied benefits associated with foreign employment and at

the time of his discharge. Obviously, he remained in Brazil at the time when Martin Marietta allegedly refused to bring him back to the United States. He cannot, therefore, claim that he was a "person within the jurisdiction of the United States." §1981.

Furthermore, if Rodrigues' §1981 claim can be read to implicate his hiring and training in Cleveland before his transfer to Brazil, it is barred by the statute of limitations. Until recently, the lack of a federal statute of limitations for §1981 actions required district courts to select the limitations period for the state cause of action most analogous to the federal case. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975). However, the Supreme Court repudiated this approach to determining the limitations period for actions brought under 42 U.S.C. §1983 (1982)

("§1983") in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985). Despite the rule of decision established in Title 42 U.S.C. §1988 (1982) ("§1988") that mandated application of the law of the State in which a civil rights case is brought, the Court noted that "no precise counterpart in state law" existed for §1983. Id. at 1945. The result of adopting different statutes of limitations for §1983 actions depending upon the predicate offense was that different limitations periods could apply within the same case, as well as within the same state. Id. at 1946. Therefore, in the interests of federal policies of uniformity, certainty, and the minimization of unnecessary litigation, the Court decided that a single limitations period should apply to all §1983 actions brought within the same state. Id. at 1947. After analyzing the policies behind the

Civil Rights Act of 1871, the Court elected the statute of limitations for personal injuries as the most satisfactory analogy. Id. at 1949.

The Third Circuit Court of Appeals promptly noted that because of the similar methodology formerly used to determine the statutes of limitations for both §1983 and §1981 claims, the Wilson decision required reevaluation of its precedent on §1981 limitations. In Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), the court noted that §1988 guides the choice of law in §1981 actions as well as §1983 claims. It found that the same federal policies justifying the application of a single state limitations period for §1983 also required that a single limitations period be chosen for §1981. Id. at 119. It was also persuaded that the personal injury claim is most analogous to §1981 claims, because

both §1981 and §1983 derive from the Fourteenth Amendment, the violation of which is "an injury to the individual rights of the person." Id., citing Wilson, ___ U.S. at ___, 105 S.Ct. at 1948. In addition, the court observed that a concurrent assertion of §1981 and §1983 claims against a state defendant would produce different limitations period for the same conduct by the same defendant if a different characterization of §1981 actions were adopted. Id. at 120. As a result, the court held, "[T]he personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under §1981." Id.

Goodman is the first reported decision to evaluate the effect of Wilson v. Garcia upon §1981 actions. This Court is persuaded by the Third Circuit's careful analysis and adopts its

holding, pending resolution of this issue by the Sixth Circuit. As the applicable statute of limitations in Ohio for §1983 actions is one year, Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), Rodrigues' claim arising in 1975-1976 is obviously time-barred. Accordingly, his §1981 claim must be dismissed.

B.

Section 1985(3) provides in pertinent part:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... [and] in any case of conspiracy set forth in this action, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the

> United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

This statute sets forth four elements of proof:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Hobson v. Wilson, 737 F.2d 1, 14 (D.C. Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1843 (1985).

The essence of Rodrigues' §1985 claim is, at best, difficult to discern. However, it is unquestionable that Rodrigues, as a permanent alien, cannot show that he was deprived of any right or privilege "of a citizen of the

United States." The §1985 claim, thus, must also be dismissed.

VI.

Rodrigues also pleads several claims involving his employment contract. In Count V, he alleges that his employment contract was breached by his termination and by Master Builders' withholding of benefits normally awarded to employees working outside of the United States. In Count VI, he avers that Martin Marietta, or its employees, tortiously interfered with his contract with his employer. The Court has jurisdiction to resolve these common law claims pursuant to 28 U.S.C. §1332 (1982).

A.

In ¶39, Rodrigues avers:

> Plaintiff further says that at all times herein mentioned, he was an employee of the Defendant, Martin Marietta Corporation, Master Builders Division; that he was transferred on June 15, 1976 to one

> of its divisions in Brazil where he continued to work until February 17, 1984, having been advised by Master Builders of Brazil, Martin Marietta Corporation Division, that he was terminated. This termination was contrary to his employment contract and was without just and sufficient cause, since his contract required that a Vice President of Master Builders of Ohio officially notify him of his termination with the approval of the President.

For many years, Ohio has abided by the employment-at-will doctrine:

> [I]n the absence of facts and circumstances which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party.

Henkel v. Educational Research Council of America, 45 Ohio St.2d 249, 251 (1976). Despite a recent invitation to abandon this doctrine, the Ohio Supreme Court has chosen only to soften its rigid contours. In Mers v. Dispatch Printing Co., 19 Ohio

St.3d 100, 104 (1985), the court recognized that the facts and circumstances surrounding an employment relationship should be evaluated in order to determine its terms:

> A priori, the facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge.

It also stated that the doctrine of promissory estoppel can limit an employer's ability to discharge a worker. Id. However, the court refused to impose a good faith requirement upon the parties to an oral employment-at-will contract. Id. at 105 (citing Fawcett v. G.C. Murphy & Co., 46 Ohio St.2d 245 (1976)).

Rodrigues apparently argues that his contract with Martin Marietta was indefinite in duration, but that notification by a Vice President and approval of the President was necessary to terminate his employment. In his deposition, Rodrigues indicates that the basis of his claim is approval from the President of Master Builders:

Q. Now your complaint states that Master Builders was required to have a vice-president notify you of your termination; is that right? Is that your allegation?

A. Yes. I will explain why. Back in the times within the Rioquima organization there were some questions about who reported the Master Builders part of it. I recall seeing this. I don't have copies with me of the personnel procedures book. It stated that I reported to the vice-president in charge of Latin America, but I could only be fired with the approval of the president of Master Builders. I recall that very vivid.

Q. With the approval of the president, is that right?

A. Yes, with some communication from him

to the fact that I was being terminated.

Q. Do you know whether your termination was approved by the president or vice-president of Master Builders?

A. All I know is they gave me a letter signed by the other director of Rioquima in Portuguese. It was handed to me by Mr. Calsado. I immediately asked if there was something from the United States. He said there was information from the United States.

* * *

Q. So it is not that the vice-president himself had to notify you, it was just that he had to approve your termination; is that right?

A. To the best of my knowledge, on the personnel procedures it said something that he had the authority only of doing it with the approval of the president. Now, if it was verbal or written, I don't know.

Rodrigues Dep. at 52-54. The deposition of Edward Ullman, who participated in the decision to fire Rodrigues, states that President Parker of the International Division of Master Builders approved Rodrigues' termination. Ullman Dep. at

47. Not only does Rodrigues fail to set forth specific facts in addition to the allegations of his complaint as required by Rule 56(e); his deposition shows that he has no personal knowledge of who has approved his dismissal. Rodrigues Dep. at 53-54. Accordingly, this Court must find that there is no material issue of fact which might permit Rodrigues to show that he was fired in violation of his employment contract.

B.

Rodrigues also alleges that he has been deprived of foreign service benefits as set forth in Martin Marietta Master Builders Policy Manual, attached to his complaint as Exhibit A. Specifically, he asserts that defendant failed to transport him back to the United States after firing him in Brazil. Aside from his allegations, however, there is no evidence to support the

inference that these benefits were part of his employment contract.

Rodrigues relies heavily upon Helle v. Landmark, Inc., 15 Ohio App.3d 1 (1984), to justify his entitlement to these benefits. In Helle, an Ohio appellate court held that the at-will doctrine does not prevent the employer and employee from adding express or implied terms and conditions to an employment agreement. Specifically, the court decided that these rights could be created by "the promulgation of employment manuals or employee handbooks, or other writings styled 'personnel policies and practices.' ... When such oral or written modifications of the original employment contract satisfy the paradigm elements essential to contract formation -- i.e., offer, acceptance, consideration -- binding obligations rise." Id.

at 8.[5]

All evidence of record reveals that the "paradigm elements essential to contract formation" were not present. Mr. Ullman testified that copies of the foreign service benefits policy are given to those who are eligible for benefits, and Rodrigues was not eligible because he was returning to his country of origin. Ullman Dep. at 11, 18. Moreover, Rodrigues' testimony leaves no doubt that Master Builders did not proffer foreign service benefits, or even supply him with a copy of the policy:

> Q. Now was it during the same investigation that you initially learned about what you characterized in your complaint as the Foreign Services Policy?

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5 Helle's conclusion that employee handbooks and the like could be evidence of the employment contract was adopted by the Ohio Supreme Court in Mers, 19 Ohio St. 3d at 104.

A. Correct.

Q. When did you first learn that there was a Foreign Services Policy of Master Builders in Cleveland?

A. After I came back to the United States.

Q. How did you learn about that policy?

A. As I arrived here the natural thing for me to do was to start contacting the people that I knew, not only on this investigation and on the fact that I was looking for another position, and as I talked to several ex-employees of the company, I came across to discuss the fact that Master Builders just simply refused to pay my return ticket and family to the United States. And in the opinion of the other individuals all that was done and everyone else got the benefits.

* * *

Q. At any time during your employment with Master Builders, did you ever discuss the Foreign Services Policy with any Master Builders employee?

A. Never.

Q. Or with any Rioquima employee?

A. No.

Q. Or any employee of Master Builders do Brazil? [sic]

A. I had no knowledge that that document existed.

Q. Nobody at Master Builders denied that that document existed, did they, because you didn't talk about it with them?

A. I had no idea that that existed so I couldn't talk about it. Nobody denied it to me that it existed.

Rodrigues Dep. at 40-41, 49.

It is hornbook law that a contract cannot exist unless an offer has been accepted. Noroski v. Fallet, 2 Ohio St.3d 77 (1982). In this case, there is no evidence that any defendant ever informed Rodrigues of, or supplied him with, the foreign service benefits policy. More importantly, Rodrigues certainly did not know about the policy until his return to the United States. This state of affairs could in no scenario constitute a "meeting of the minds." Indeed, the Helle court itself observed, "[I]f appellants had never learned of Landmark's severance policy,

they could hardly be heard to complain about being denied benefits they were never offered." 15 Ohio App.3d at 9 n. 8. Rodrigues' failure to receive any communication from the defendants about the Foreign Service Benefit policy precludes his claim that these benefits are contractually owed to him.[6]

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6 Rodrigues might argue that his unnotarized affidavit creates a material issue of fact by asserting that he was orally offered all fringe benefits payable by Master Builders:

> In negotiating my job with Master Builders, it was agreed between myself and George Tazelaar, who was then and there vice president of international sales for the Master Builders Division of the Martin Marietta Company, that I was to receive in addition to my salary, all fringe benefits at the inception of my employment with Master Builders. These fringe benefits included among other things certain health and other insurance and my participation in the pension plan. I did in fact receive these benefits as is evidence [sic] by the attached document which I received

C. In ¶44 of the complaint, Rodrigues avers "that the Defendant, Martin Marietta Corporation, Master Builders Division, and more especially its officers, agents and employees acting within the scope of their employment intentionally interfered with the Plaintiff's contractual advantageous relations with Plaintiff's employer causing the Plaintiff to sustain damages as set forth in Count V." This claim is contrary to Ohio law.

In Fawcett, 46 Ohio St.2d at 250, the Ohio Supreme Court stated:

> Causes of action have been recognized against "outsiders" for malicious interference with employment. Johnson v. Aetna Life Ins. Co. (1914), 158 Wis.

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6 cont'd

from the Martin Marietta Company.

Rodrigues Affidavit, ¶1. However, this allegation clearly refers only to benefits receivable during the beginning of his employment in Ohio.

> 56, 147 N.W. 32. Where, however, the act complained of is within the scope of a defendant's duties, a cause of action in tort for monetary damages does not lie. Nor can liability be predicated simply upon the characterization of such conduct as malicious.

Moreover, no Martin Marietta employees are defendants in this action, except for those who presumably administer its pension plan. The suggestion that Master Builders could interfere in a relationship with itself is nonsensical.

VII.

Rodrigues finds himself in the awkward position of being an alien with permanent residence in this country, but working during most of his employment in question in his home country of Brazil. As a result, he is an alien who perhaps should be accorded the protection of United States law, but he is outside the jurisdiction of that law. Thus, his civil rights claims fall outside of the

lines drawn by Congress. Further, his pension claims must fail because he cannot satisfy the terms of the plan for vesting. His contract claims fail because the terms which he attempts to enforce are not part of the contract. Inevitably, both statutes and case law establish lines which clarify who fails on either side. Just as inevitably, there are some cases where falling outside of the lines is painful.

For the reasons set forth above, defendants' motion for summary judgment is granted; plaintiff's motion for summary judgment is denied; and judgment is entered for the defendants, each side to bear its own costs.

IT IS SO ORDERED.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

NOT
RECOMMENDED FOR FULL TEXT PUBLICATION

NO. 86-3403

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALDO P. RODRIGUES,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL
	)	FROM THE
v.	)	UNITED
	)	STATES
MARTIN MARIETTA CORPORATION	)	DISTRICT
MASTER BUILDERS DIVISION,	)	COURT FOR
et al.,	)	THE NORTH-
	)	ERN DIS-
Defendant-Appellee.	)	TRICT OF
	)	OHIO

Decided and Filed September 16, 1987

BEFORE: MARTIN, NELSON and BOGGS, Circuit Judges.

PER CURIAM. This case involves the effort by Ronaldo Rodrigues, a Brazilian national employed, and later laid off, in Brazil, by a Brazilian subsidiary of a United States corporation, to come within the protections of United States law to attack his firing and

denial of certain fringe benefits as employment discrimination. Because we find these efforts unavailing, we affirm the opinion of the District Court granting summary judgment against his cause of action.

I

Rodrigues was hired by Martin Marietta in October 1975, with the clear understanding that he would become an employee of Martin Marietta's Brazilian subsidiary, Rioquima, S.A., and that his employment would be entirely outside of the United States under the auspices of a foreign company. Rodrigues was, however, given training for nine months on the payroll of Martin Marietta's Ohio subsidiary, Master Builders. At the end of this time, his employment with the domestic company was terminated, and he began immediately with the Brazilian company. In 1984, Rodrigues was fired

because of lagging sales. After various proceedings in Brazil, Rodrigues's claim against the Brazilian company was settled for $18,000. He then began an action in federal court here for employment discrimination based on his failure to receive the same benefits as United States citizens employed in Brazil. Rodrigues pursues this claim under a number of different theories, which must be analyzed separately. These theories include Title VII of the Civil Rights Act, 42 U.S.C. § 1981, 42 U.S.C. § 1985(3), Ohio state law, and ERISA. Although Rodrigues attempts to label his claim discrimination on the basis of national origin, the reason he did not receive the same benefits as would a United States citizen during employment in Brazil was that he was a Brazilian citizen and not the fact that he was born in Brazil. He is thus complaining

of discrimination on the basis of alienage rather than national origin.

II

The Title VII claim is essentially defeated by 42 U.S.C. § 2000e-1, which states that this part of the act does not apply "with respect to the employment of aliens outside any State.. .." As Rodrigues was an alien employed in Brazil, he has no claim under Title VII. He attempts to evade this barrier by claiming that the discrimination occurred, or his rights attached, at the time he was employed in Ohio. Even had he been a United States citizen, he would have been terminated by the Ohio corporation upon completion of training and re-employed by the Brazilian company on commencing work there. Thus, there was no discrimination while employed in Ohio. Further, even if there were discrimination in Ohio, it would have been on the

basis of alienage, which is not barred by Title VII. 42 U.S.C. § 2000e-7(a)(1): Espinoza v. Farah Manufacturing, 414 U.S. 86, 95 (1973). To the extent aliens in the United States are under the protection of Title VII, it is only with regard to discrimination based on race, color, religion, sex or national origin. Rodrigues makes no claim that he would have been treated as he was, were he a United States citizen of Brazilian origin, and thus even this narrow ground is not available to him.

III

Rodrigues cannot state a claim under Section 1985(3), which provides a private damages action against persons conspiring to deprive another person of any right or privilege of a citizen of the United States. Section 1985(3) does not create any substantive rights itself, but merely provides a private remedy for

a violation of civil rights secured by the Constitution or federal statutes. Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 372 (1979). As this opinion makes clear, Rodrigues cannot establish a violation of ny federal right. He thus has no basis for claiming a remedy under section 1985(3).

The Ohio state law claims, based on violation of Ohio Rev. Code § 4112.02 forbidding national origin discrimination, encounter two obstacles. The first is that there is no private right of action absent a filing with the Ohio Civil Rights Commission. Dadas v. Prescott, Ball and Turben, 529 F.Supp. 203 (N.D. Ohio 1981). The second is that the law shows no indication that it is meant to apply outside the United States, and the general rule of construction is that such coverage is not to

be presumed, unless clearly indicated. Restatement (Second) of Foreign Relations Law of the United States § 38 (1965).

V

The claim under ERISA also encounters two obstacles. First, Rodrigues was not a participant in any pension plan subject to ERISA. He was in a Brazilian pension plan, and his rights there had not yet vested. To the extent that his claim is that he should have been in a domestic plan, he simply has an employment discrimination claim, and ERISA extends no protections not afforded by Title VII. The district court correctly recognized that the anti-discrimination provision of ERISA does not apply to discrimination on the basis of race, national origin, or alienage, but only to discrimination against employees pursuing pension rights. 29 U.S.C. § 1140. Rodrigues makes no claim of

discrimination of this sort.

VI

Rodrigues's claim under 42 U.S. C. § 1981 is the only one with even arguable merit. 42 U.S.C. § 1981 states that all persons within the jurisdiction of the United States shall have the same right to make contracts as is enjoyed by white citizens. Section 1981 has been held to provide protection against discrimination on the basis of alienage. The Supreme Court has struck down state laws prohibiting aliens from obtaining fishing licenses. Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), and welfare benefits, Graham v. Richardson, 403 U.S. 365 (1971), on the basis that section 1981 guarantees lawfully admitted resident aliens "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Since

Runyon v. McCrary, 427 U.S. 160 (1976), the right to make contracts has included, at least on the part of purchasers of school services, the right to make contracts even with unwilling parties.[1] Thus, at first blush Rodrigues makes an intriguing point as to whether his right to make a contract with the Ohio company was in some way impaired. Although the reach of section 1981 has recently been extended to certain ethnic groups in St. Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987), the Court has not

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1 This interpretation does not appear to have been extended to sellers of services, or goods, which is the position of Rodrigues here. It has not been suggested that parents who choose a White-run private school over a Black-run school, or a Black-owned apartment over one owned by Whites, run afoul of section 1981.

considered the application of section 1981 to a claim of private employment discrimination on the basis of alienage, as opposed to race or national origin.

We need not reach this issue here. Rodrigues cannot claim protection under section 1981 because he was not within the jurisdiction of the United States at the time of the alleged discrimination, during his employment in Brazil. While he was within the jurisdiction of the United States, Rodrigues received the same employment benefits enjoyed by United States citizens under the same type of contract. Rodrigues argues that his rights under section 1981 attached at the moment of his hiring in Ohio. We do not find this argument persuasive. By its own terms, which limit protection to persons within the jurisdiction of the United States, section 1981 indicates that it is not intended to

have extra-territorial effect. Regardless of where Rodrigues signed the contract with Martin Marietta, the discrimination of which he complains, the denial of certain fringe benefits, took place outside the jurisdiction of the United States. Any protection extended by section 1981 to aliens within the United States is certainly not extended to employment relationships between companies and aliens outside the borders of this country.

In the absence of any clear statutory basis for a claim, there is also a strong policy reason for rejecting claims of the type raised here by Rodrigues. United States law clearly allows different treatment of United States citizens and foreign nationals in employment abroad. If the theory advanced here should prevail, it would become much more difficult and expensive

for domestic companies to offer training or experience in the United States to their foreign employees, because the full panoply of benefits offered to United States citizens working abroad could be required permanently for any foreign national who works temporarily in the United States. This would work to the detriment of the employees themselves, the companies, and international trade and economic development. In the absence of any interpretation of congressional intent that would lend credence to such a result, we believe the clear bar to the extra-territorial application of section 1981, Title VII, and other anti-discrimination laws should prevail.

VII

The decision of the district court is AFFIRMED.

STATUTES INVOLVED

28 USCS § 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 USCS § 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1,72 Stat. 415.

28 USCS § 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business; Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 USCS § 1343. Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) The District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbua shall be considered to be a statute of the District of Columbia

29 USCS § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

42 USCS § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be sjubject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USCS § 2000e-1

This title [42 USCS §§ 2000e et seq.] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(a) Employers. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin

as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious

corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an emagency to fail or refuse to refer any in-

dividual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if --

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be

an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employemnt practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be padi to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)) [29 USCS § 206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title

[42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any empolyment agency or labor organization, admitted to member ship or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other trianing program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 USCS § 2000e-7

Nothing in this title [42 USCS §§ 2000e et seq.] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.].

Ohio Revised Code §4112.02:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, handicap, age, or ancestry to:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request indicates, directly or indirectly, that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry;

(2) Discriminate against, limit the

employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, handicap, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency or personnel placement service, or labor organization, pricr to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information re-

garding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a non-discrimination clause with the government of the United States, or any department or agency thereof, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain such proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying, or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion,

sex, national origin, handicap, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement which specifies or in any manner indicates that person's race, color, religion, sex, national origin, handicap, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, handicap, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges thereof.

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of such housing;

(2) Represent to any person that housing is not available for inspection when in fact it is available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, re-

habilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing;

(5) Discrimination against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occu-

pant, or user of such housing;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, ancestry, handicap or national origin;

(8) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing;

(9) Include in any transfer, rental, or lease of housing any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior

inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a housing listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any person in the terms or conditions of such access, membership,

or participation, on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Whether or not acting under color of law, by force or threat of force willfully injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with;

(a) Any person because of race, color, religion, sex, national origin, handicap, or ancestry and because that person is or has been selling, purchasing, renting, financing, occupying, contracting, or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization, or facility, relating to the business of selling or renting housing accommodations;

(b) Any person because that person is or has been, or in order to intimidate that person or any other person or any class of persons from:

(i) Participating, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities,

services, organizations, or facilities described in division (H)(13)(a) of this section;

(ii) Affording another person or class of persons opportunity or protection so to participate.

(c) Any person because that person is or has been, or in order to discourage that person or any other person from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (H)(13)(a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, secual, or ethnic composition of the block, neighborhood or area.

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry, handicap, or national origin of any prospective owner or user of such lot.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or corece the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with sections 4112.01 to 4112.11 of the Revised Code, or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or main-

tained.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to employ or train a handicapped person in a job that requires him routinely to undertake any task, the performance of which is substantially and inereently impaired by his handicap.

(M) Nothing in division (H) of this section shall be construed to require any person selling or renting property to modify such property in any way or to exercise a higher degree of care for a person having a handicap, nor shall it be construed to relieve any handicapped person of any obligation generally imposed on all persons regardless of handicap in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease agreement, or contract.

(N) An aggrieved individual may enforce his rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty

days after the alleged unlawful practice occurred, in any court of competent jurisdiction for any legal or equitable relief that will effectuate his rights. A person who files a civil action under this division is, with respect to the practices complained of, thereby barred from instituting a civil action under section 4101.17 of the Revised Code or from filing a charge with the Ohio Civil rights commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation which may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement pension, or insurance plan, which is not a subterfuge to evade the purposes of this section; however, no such employee benefit plan shall excuse the failure to hire any individual and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual

because of his age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," P.L. 95-256 Section (2)(b), 92 Stat. 189 (1978), 29 U.S.C. 623;

(3) Retire an employee who has attained sixty-five years of age but not seventy years of age who, for the two-year period immediately before the retirement is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, which equals, in the aggregate, at least twenty-seven thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," P.L. 95-256 Sec (3), 92 Stat. 189 (1978), 29 U.S.C. 631;

(4) To observe the terms of any bona fide apprenticeship program if such program is registered with the Ohio apprenticeship council pursuant to sections 4101.25 to 4101.30 of the Revised Code, and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in chapter 4112. of the Revised Code prohibiting age discrimination shall be construed toprohibit:

(I) the designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapters 145., 742., 3307., 3309., or

5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) the maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code.

(4) The maximum age requirements established for original appointment to a police department or fire department in section 124.41 and 124.42 of the Revised Code;

(5) any maximum age not in conflict with federal law which may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police office or fire fighter;

(6) any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and fire fighters.

AFFIDAVIT OF RONALDO RODRIGUES

Ronaldo P. Rodrigues says that he is the plaintiff in the above captioned case and gives this affidavit in support thereof as follows:

1. In negotiating my job with Master Builders, it was agreed between myself and George Tazelaar, who was then and there vice president of international sales for the Master Builders Division of the Martin Marietta Company, that I was to receive in addition to my salary, all fringe benefits at the inception of my employment with Master Builders. These fringe benefits included among other things certain health and other insurance and my participation in the pension plan. I did in fact receive these benefits as is evidence by the attached document which I received from the Martin Marietta

Company.

2. We had discussed the possibility that I would be assigned to Brazil after completing training at Master Builders but such assignment was tentative and not for sure certain. As a matter of fact, when I did in fact go down preliminarily, to Brazil, at Master Builders request and expense, to see whether I was acceptable to the person in charge of the Brazilian Company, Mr. Carlos Cueva, the president of Rioquima, I came back to Master Builders in Ohio to find that he did not want me down there. Other possible assignments were discussed and I was given the option by Mr. Tazelaar and Mr. Pete Zhun, vice president of international of Master Builders, as to whether I wanted to go to Brazil.

3. I, in exercising the perog-

ative given me, decided to go to Brazil notwithstanding the opposition because Mr. Tazelaar and Mr. Zhun said they would back me. I believed at that time and until my return to this country in 1984 that I was working for Master Builders of Ohio that controlled the Brazilian companies I worked for from 1976 through February of 1984 and that I believed I was to receive and did receive all fringe benefits Master Builders gave its employees who were hired in the United States and transferred outside the country.

4. It was when Edward Ullman refused to pay my way back to this country in early 1984, after I was notified of my termination by Mr. Carvalho, the Brazilian director of administration, who was in charge of Master Builders of Brazil, that I began to feel that I was wrongfully being denied some fringe bene-

fits, since Master Builders of Ohio had paid my travel expense to Brazil in 1976 and thereafter. I did not discover that I was wrongfully denied foreign service fringe benefits for sure until July 1984.

5. I regarded myself as having been transferred from Master Builders to the Brazilian companies from what I was told by George Tazelaar and other employees. Mr. Tazelaar had told me from time to time that my assignment in Brazil was not permanent and offered to me positions that might open up to which he would assign me if and when. He signed an affidavit dated June 2, 1976 which was necessary for me to bring my auto into Brazil, which stated therein that I was being transferred. This reinforced my belief that I was a transferred employee of Master Builders. He subsequently acknowledged to me that he had offered these positions to me as stated and that

I was not on permanent assignment in Brazil. I expected and relied upon our understanding that I would continue to receive all fringe benefits of a Master Builder's employee though I never made any inquiry as to them while in Brazil.

6. I never was advised at any time during my employment from 1975 through 1984 that there were any special foreign service benefits due me, nor was I aware of them. I subsequently learned when I attended a deposition of Edward Ullman taken in my case that these benefits are not made known to the employees generally. I never knew of them until July of 1984.

7. I never knew nor was I ever notified that I was being discharged or terminated as an employee of Master Builders of Ohio in 1976 when Master Builders transferred me to Brazil and

placed me on the payroll of Rioquima, its Brazilian Company. I have subsequently learned at Mr. Ullman's deposition in this case that the foregoing was an internal procedure of Master Builders. I learned there also that Master Builders regarded me as a minority and classified me as a Hispanic while I was employed by them. I was always responsible to and under the complete direct control of Master Builders of Ohio and took my orders and reported to them while working for its Brazilian Companies. Consequently, I regarded myself as an employee of Master Builders of Ohio from October 27, 1975 through February 17, 1984 and conducted myself accordingly. In exchange for these benefits I worked substantially in excess 40 hours per week.

8. I never was given an opportunity to negotiate for the foreign service benefits accorded other employees

of national origins other than Brazil hired in the U.S. by Master Builders of Ohio and transferred to a foreign country. I was told for the first time by Mr. Edward Ullman at his deposition taken in my case on January 31, 1985 that I would not have been hired in 1975 were I to receive foreign service benefits. I was not to receive foreign service benefits because, according to Uhllman I was regarded by Master Builders as a Brazilian National going back to Brazil. I never understood this to be the case, since I was a permanent resident in Cuyahoga County, Ohio, U.S.A. since 1964. Since 1964 I married and had two children born in Cuyahoga County. I was employed here and registered for the draft. I studied at Cleveland State University which resulted in a degree in international business management from that University.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on February 26, 1985.

Ronaldo Rodrigues /s

PLAINTIFF'S EXHIBIT 3

Your Personal Benefits Profile 1976

MARTIN MARIETTA

Important Information About Your Profile

The benefits shown in this report have been calculated using the assumption that your income will continue at its present level to your normal retirement date and that the Plans and other factors affecting your personal situation will continue unchanged.

Social Security benefits are shown for various family compositions and are those in effect on 1/1/75. Normally all children under 18 are considered dependent and it is assumed that you are both fully and currently insured. Since it would be difficult to consider your earnings history under Social Security, current base salary is used. Because of these various assumptions, Social Security benefits reflected on this report may vary from those which you would actually receive.

The Pension Plan benefits were computed as of 12/31/75, and were calculated on the assumption that your salary will continue at its current level and that other pertinent factors will remain unchanged. Since these benefits are integrated with Social Security and dependent upon your income, your actual retirement benefit will vary as Social Security laws and your salary change.

Every effort has been made to insure that this report is accurate; however, your entitlement to any benefit is subject to the applicable provisions and limitations of the Company's benefit plans and policies governing the grant of such benefits.

If you have any questions or comments concerning this report, please contact the Industrial Relations or Insurance Department of your Division.

More Information About Your Pension Plan

The retirement benefits shown this year are in the form of both 50% Joint and Survivor and Straight Life annuities. Since under the Joint and Survivor option, benefits continue for your surviving spouse, the amount available to you is less than under the Straight Life Payment, which is for your lifetime only. Other options are available and your Pension Plan booklet provides information concerning them. As to employees eligible for Early Retirement, the benefits payable may vary from the amount shown due to the availability of information.

The benefits derived from the Pension Plan may vary from year to year since the "final average earnings" used to calculate such benefits are adjusted by the Covered Compensation Base under the Social Security Act. The base on which your benefits were calculated this year reflects the 1975 Amendments.

Your Financial Plan

This report of the various benefits provided to you by the Company offers you information that is interesting and useful. Its most important use will be realized if it becomes the catalyst for you to either create or update your family financial plan. Right now is the time for you to be sure you have properly provided for your family and their security.

First, you should have a good up-to-date will drawn for you by an attorney who specializes in matters of this sort. Second, you should have prepared and begun to implement an insurance program that will afford your family adequate protection in the event of your death. Third, you should have established your own retirement goals and the plan necessary to accomplish them. And finally, your spouse and other dependents should be made aware of and counseled about your goals and plans and how they will be affected by them.

The following section is included to assist you in updating your plans and in communicating with others about those plans.

1. Will and/or Trust

   Have you reviewed your will and/or trust instrument within the past year for:

   a) Changes in beneficiaries resulting from births, deaths, marriages, etc.?
   b) Changes in circumstances resulting from maturity of children, illness, significant increase or decrease in value of assets, etc.?
   c) Changes in federal or state tax, probate, or property law which may affect your will or trust provisions?
   d) Appropriate use of the marital deduction and appropriate designations of executors, trustees, and guardians for your children?

2. Insurance Program

   a) Are the beneficiary designations for your insurance policies up-to-date?
   b) Is your insurance coverage adequate to meet your present needs?
   c) Have you thoroughly considered an insurance trust to add flexibility and investment management to your insurance program?

My will is located at _____ and was executed on _____

Important people to contact in the event of my death:

My attorney — Name _____
Address _____
Tel. No. _____

My executor — Name _____
Address _____
Tel. No. _____

My insurance advisor — Name _____
Address _____
Tel. No. _____

I maintain bank accounts as follows:

BANK	TYPE OF ACCOUNT	ACCOUNT NO.

My bank books and records are located at/in _____

My insurance policies are located at/in _____

My safe deposit box is located at _____

Your Security Today

Medical Benefits

FOR YOU AND YOUR COVERED DEPENDENTS

Hospital Expense Benefits

For any one period of confinement (including maternity):

100% of charges for semi-private room or intensive care facility, board, necessary services and supplies for up to 365 days.

Convalescent hospital charges covered for up to an additional 365 days.

Surgical and Medical Expense Benefits

Payment for surgeons' charges and anesthetists' fees in accordance with the Surgical and Anesthesia Schedule.

Diagnostic services are payable in accordance with the Diagnostic Examination Schedule.

In-hospital doctors' attendance fees are payable at a rate of up to

$6 per day to a maximum of $2,190 per confinement.

$50 maximum per accident for emergency physician's treatment or ambulance service.

Medical Catastrophe Benefits

Supplementing the basic Hospital/Surgical/Medical benefits, and after payment of a $100 individual calendar year deductible ($250 maximum family deductible), the plan pays

80% of covered expenses up to $4,000, then

100% of covered expenses up to a lifetime maximum of $100,000 per individual, which is subject to an automatic reinstatement of up to $1,000 on each succeeding January 1st.

Disability Benefits

If you become disabled and are unable to work as a result of an accident or sickness, you may be entitled to receive the following benefits:

Short Term

FULL BASE SALARY WILL BE CONTINUED FOR A PERIOD OF UP TO 6 MONTHS OR YOUR LENGTH OF CONTINUOUS SERVICE, WHICHEVER IS LESS.

Long Term

After six months of total and continuous disability you will receive an estimated monthly income of:

$323 Long Term Disability Plan to age 65† ,
WHICH INCLUDES
Social Security for you.

†The LTD Plan is designed to guarantee you 66⅔% of base salary (maximum monthly benefit $2,000). When combined with family Social Security benefits your total income may be as high as 75% of base salary.

The following additional estimated monthly benefits may be payable to your eligible dependents from Social Security:

$269 for a spouse with one or more children.

$121 TO $161 for a spouse only, age 62 or over.

In the event of total and permanent disability, you will also be eligible for:

$15,000 Group Life Insurance continued at no cost to you to age 65. Medical insurance can be continued on a contributory basis.

PLUS Your pension credits continue to accrue.

If total and permanent disability results from an accident, you may also receive:

$50,000 maximum payable from your Travel Accident Insurance if disabled while traveling on authorized company business away from your usual place of employment.

$30,000 Special Accident Insurance.

Survivors' Benefits

In the event of your death your beneficiaries will receive:

$6,000 Pension Plan.
$15,000 Group Life Insurance.
$255 Social Security Death Benefit.
$21,255 Total.

PLUS all medical coverage for your eligible family members will be continued at no cost for 6 months.

In addition, your dependent family may receive the following estimated monthly benefits from Social Security:

$593 for a spouse with two or more children.
$485 for a spouse with one child.
TO $323 for a spouse only, age 60 or over.

Additional Accident Benefits

$15,000 Accidental Death and Dismemberment Insurance.
$50,000 Travel Accident Insurance, if death occurs while traveling on company business.
$30,000 Special Accident Insurance Plan.

Your Security Tomorrow

Normal Retirement Benefits

On your normal retirement date,
FEBRUARY 1, 2009 at age 65 you will be eligible to receive an estimated lifetime monthly income of:

$126	Pension Plan Joint and Survivor benefit.
$323	Social Security.
$449	Total.

In the event of your death after retirement, your surviving spouse will continue to receive $63 monthly for life.

If you are single at retirement, or if you waive the above benefit, you would receive the following monthly benefits, where, upon your death, all Plan payments would cease:

$166	Pension Plan Straight Life Annuity.
$323	Social Security.
$489	Total.

It is interesting to note that you would have to accumulate approximately $19,838 independently to provide the monthly $166 Straight Life Annuity at age 65.

$121 TO $161 additional Social Security estimated monthly benefit payable to your dependent spouse, depending upon spouse's age (62 to 65) when you retire.

PLUS you may elect to continue medical coverage which is coordinated with Medicare.

Early Retirement Benefits

YOU MAY RETIRE AS EARLY AS FEBRUARY 1, 1999 AT AGE 55 AND RECEIVE A LIFETIME MONTHLY INCOME.

What Are Your Benefits Worth?

As a salaried employee of Martin Marietta the major benefits available to you and your family are:

☐ Hospital-Medical-Surgical Coverage ☐ Medical Catastrophe Benefits ☐ Short Term Disability ☐ Long Term Disability ☐ Group Life Insurance ☐ Accidental Death and Dismemberment Insurance ☐ Special Accident Insurance ☐ Travel Accident Insurance ☐ Pension Plan ☐ Social Security (company matches your contribution) ☐ Vacations and Holidays

[Subject to applicable plans and policies]

$1,969 is the estimated total annual cost of your benefits, excluding the cost of your Pension Plan.

$434 is your estimated annual rate of contribution, incl: $351 to Social Security.

$1,535 is the estimated annual cost to the Martin Marietta Corporation, excluding the cost of your Pension P[lan].

[Other valuable benefits not detailed above include Matching Gifts, Educational Assistance, Workmen's Compensation, and Life Insurance.]

To Our Salaried Employees

Once again it is a pleasure to send you this comprehensive summary of the personal benefits and services you receive in addition to your salary.

This confidential statement relates to your own situation and updates similar information given to you last year.

Knowing just how much protection and security your Martin Marietta benefits program provides should be an important aid to you and your family. With this knowledge, you can make better decisions about your personal financial plans. We encourage you to review this report carefully and discuss it with your family.

You may be assured that we continually review these benefits with the objective of keeping them up to date and competitive with the best programs available.

If you have any questions or comments about your benefits or this profile, please feel free to contact the Industrial Relations Department or the Insurance Department in your division.

Douglas V. Dorman
Vice President
Industrial Relations

MARTIN MARIETTA CORPORATION
11309 ROCKVILLE PIKE, ROCKVILLE, MARYLAND 20852

Date of birth 1/28/44
Date of spouse's birth NOT ON RECORD
Pension Service date 10/27/75

Prepared especially for:

R. P. RODRIGUES
414-74-3705 038

As of: DECEMBER 31, 1975

STATE OF OHIO)
SS. AFFIDAVIT
COUNTY OF CUYAHOGA)

I, PAUL GUTMANN, being first duly sworn, deposes and says the following:

1) I was an officer of Master Builders, a Division of Martin Marietta Corporation, and functioned as Vice President of International from 1978 to 1983. From 1966 to 1978, I was employed by Master Builders in various positions such as sales representative (1966-70), manager (1970-72), regional manager (1972-76) and division manager of Master Builders of the United States (1977-78).

2) Ronaldo P. Rodrigues worked for Martin Marietta beginning in 1975 in Cleveland, Ohio, and was transferred in 1976 to Brazil as a foreign service employee where he remained until 1984 when he was terminated. Ronaldo P.

Rodrigues was never, either initially or at any other time, a foreign national being returned to him home country since his status was otherwise, Rodrigues having established permanent residence in the United States 13 years prior to his applying for work at Martin Marietta.

3) An an officer, I was aware of and had full knowledge of the operations and the corporate policy of Master Builders during the years Ronaldo Rodrigues was employed. I had personal knowledge of Rodrigues' employment at Master Builders, and he fully qualified for foreign service benefits.

4) The corporate policy of Master Builders for the years Rodrigues was employed included paying foreign service benefits to employees in accordance with the foreign service policy manual. Foreign service benefits in-

cluded continued funding of Social Security and the Pension Plan by Martin Marietta. Master Builders retained full control over the foreign service employees from the United States. The foreign service employees continued to be regarded as Martin Marietta employees since Master Builders had the right to hire and fire. They also were eligible to receive incentive awards, employee service pins, promotions and reprimands from Master Builders as if they were still on U.S. soil. Ronaldo Rodrigues received from Master Builders of Ohio a five (5) year service pin, promotions, rewards and discipline. He was brought to the U.S. at Master Builders of Ohio expense and attended international meetings under the policy.

5) Ronaldo P. Rodrigues was qualified in every aspect for foreign

service benefits under the corporate policy of Master Builders since he was hired by Master Builders of Ohio and transferred to a wholly owned subsidiary in Brazil. I was never aware that Ronaldo P. Rodrigues was being denied these benefits.

6) Rodrigues was hired in Ohio by Master Builders, worked in Ohio in 1975-76 and then transferred outside the country to work in a wholly owned subsidiary of Martin Marietta Corporation. Rodrigues was transferred in our usual procedure. For accounting purposes we internally terminate the transferred employee on the books of Master Builders of Ohio and place him on the payroll of the foreign company.

7) As part of orientation, Master Builders tells our newly hired people we are an equal opportunity

employer and that they can rely on this.

8) It was company policy that employees were advised as to foreign service benefits only before actually being transferred in a private conference with a corporate officer.

9) To my knowledge Ronaldo P. Rodrigues was the only employee of Master Builders of Ohio qualified to receive foreign service and pension benefits but did not receive them.

10) There were aliens hired of national origin other than Brazilian who were transferred out of the United States to work in foreign countries who received foreign service benefits. Martin Marietta Corporation, Master Builders Division, followed an internal procedure in each and every case of terminating a transferring employee on paper with Master Builders of Ohio. The employee

would then be placed on the payroll of the foreign company. However, the management regarded the people so assigned as (transferred) employees of Master Builders. The purpose of the foreign service benefits was to have people who resided in the United States continue to enjoy a standard of living equivalent to Master Builders of Ohio while employed by a subsidiary out of the country.

(11) Frank Shubert, a German national who was hired in the United States by Master Builders, was sent to Belgium to work for Master Builders. He was a U.S. resident alien green card holder. He received the foreign service policy benefits denied to Ronaldo P. Rodrigues. Ronaldo P. Rodrigues is and was throughout his employment with Martin Marietta a U.S. resident alien green card holder.

12) The foreign service policy

of Master Builders is clearly stated in the company policy manual. As a matter of practice these policies applied to all employees hired by Master Builders in this country and subsequently transferred to work outside of this country. This corporate policy of Master Builders was part of Rodrigues' and other like and similar employees contract of employment.

13) There never was, based upon my knowledge while working for Master Builders and my knowledge of the history of the company, a Master Builders' policy of hiring a foreign national to work for Master Builders of Ohio in the United States and, thereafter, return him to work in the country of his origin, without giving him the foreign service benefits. A resident alien hired to work for Master Builders of Ohio in the U.S. subsequently transferred to a foreign

country was always given foreign services benefits regardless of which country he came from or went to.

14) I regarded the foreign service benefits as part of the employment contract of a person so transferred and it was so regarded by the company.

15) Rodrigues was not permanently assigned out of the United States or permanently assigned to Brazil, but was subject to relocation at any time. Master Builders could have pulled Ronaldo Rodrigues back to the United States at any time and reassign him elsewhere.

16) I was aware that George Tazelaar, Vice President - Latin America, Master Builders, promised from time to time when the opportunity presented itself, increased responsibilities to Rodrigues.

17) Rodrigues worked in Argentina as well as in Brazil. At

least one other employee transferred out of the country for over five (5) years was returned to the United States and received the benefits.

18) I was aware of a compact between Martin Marietta Corporation and the United States Internal Revenue Service, whereby Martin Marietta agreed to pay the social security benefits for all employees hired in the United States and transferred out of the country. The employee would later repay Master Builders, Martin Marietta, his appropriate portion which Martin Marietta advanced while the employee was out of the country.

19) That the management of Master Builders always worked with foreign service employees and paid their way to the United States even when the company fired the employee for cause. If terminated for lack of work or concluding

operations, they would receive this benefit. I talked to Rodrigues during his employment and I knew of his intention to return to the United States as his home country, to work for Master Builders in the international field and his willingness to relocate in order to continue this upward mobility.

20) I was advised and informed by the Martin Marietta Corporation that social security and the pension plan was one package and it was presented both to myself and other employees as one package for me and their retirement such as exhibit A attached herein.

21) Master Builders of Ohio would pay the foreign service benefits such as tax equalization and the cost of returning the employee and his family home from the foreign service assignment after the employee was returned to the United States.

22) Rodrigues was the only Master Builders employee ever hired in the United States and transferred to another country who did not receive any of the foreign service policy manual benefits, pension included. His was the only case in which aliens hired in the United States by Master Builders and transferred out of the country did not receive foreign service benefits.

23) Master Builders has been sold on a particular day. To my knowledge, Edward Ullman and Edward Parker have remained with Master Builders which is no longer a part of Martin Marietta.

s/ Paul Gutmann
PAUL GUTMANN

Sworn to and subscribed before me, a notary public, on this 25 day of July, 1985.

s/ Robert J. Marek
Notary Public (SEAL)